



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**Civil Appeal 61 of 2004**

**Arising from original civil suit no. 333 of 2004**

**AET MINERALS LTD ).....1ST APPELLANT**

**STATION JAMBO SAFARIS ).....2ND APPELLANT**

**DOMNIC OTIENO alias KABILA).....3RD APPELLANT**

**VS**

**KENNEDY LUMBUKU T/A ).....1ST RESPONDENT**

**WAMBUKA FREIGHTERS ).....2ND RESPONDENT**

**R U L I N G**

Under Order XLI rule 4 of the Civil Procedure rules the 2nd appellant herein, station Jambo Safaris, moved this court for an order of stay of execution of the order issued on 3.11.2004 by the Resident Magistrate in Busia S.R.M.C.C. No. 333 of 2004. The decision is contained in a well considered ruling arising out of an application filed pursuant to the provisions of Order VI rules 11, 13 (d) and 16 and Order VIA rules 1, 2 and 8 of the civil procedure rules. Basically the court ruled that the firm of Otieno Odek & Co. Advocates were improperly on record and therefore had no capacity to agitate the application before it on behalf of the 2nd appellant i.e. the 2nd defendant by then. The court also struck out the re-amended plaint on the basis that no leave was obtained prior to the filing of the same. The 2nd appellant has now preferred an appeal against the aforesaid decision. The 2nd appellant now seeks for a stay of execution of the aforesaid decision pending appeal. The motion is supported by an affidavit sworn by Baluku Geoffrey dated 21.12.2004. As expected the Respondent opposed the motion by filing grounds of opposition dated 19th January 2005.

The applicant has averred that the Respondent is likely to execute the order which action may cause substantial loss to it. It is also argued that the Respondent is likely to arrogate himself the security of Ksh.60, 548/= any time before the appeal is heard and determined.

It is also argued that this appeal has high chances of success and that the motion was filed without undue delay.

The Respondent is of the view that the orders sought in the motion should be rejected because the appeal is hopeless and incompetent because the same was filed without leave of court. The applicant is also accused of failing to offer security. The Respondent further averred that the applicant will suffer no loss if a stay order is refused.

The most serious argument postulated by the Respondent is that this appeal is incompetent for want of

leave. The appellant is of a different view that no leave is needed under the law. I have perused the provisions of Order XLII rule 1 (1) (c) and (d) of the civil procedure rules and it is clear that appeals arising out of decisions based on Orders VI and VI A of the civil procedure rules lie as of right hence no leave is required prior to the filing of the appeal. Consequently this appeal is competent.

Having come to that conclusion, it is now important to examine the provisions of order XLI rule 4 of the civil procedure rules. An applicant must show that he would suffer substantial loss if an order of stay of execution is not granted. The motion must be filed without unreasonable delay. The issue on security must be considered. Of course the applicant must also prove that he has an arguable appeal with a probability of success and that the appeal may be rendered nugatory.

I have perused the grounds raised on the memorandum of appeal. One of the grounds stated therein is that the trial magistrate erred in failing to appreciate the fact that he arrived at his decision without establishing that there was no evidence of service of the summons to enter appearance. I am of the view that this is one of the grounds which is arguable. Therefore I think that the appeal herein is not frivolous nor vexatious. The applicant has complained that there is a possibility that the amount deposited is likely to be withdrawn by the 1st appellant to the 2nd appellant's utter detriment. I have considered this argument.

The applicant has not shown how it would suffer substantially if the deposit is collected by the party who made the deposit. What is not in doubt is that the 2nd appellant did not make the deposit. Of course the applicant may not suffer substantial financial loss but it would certainly suffer loss if the status quo is not maintained pending appeal. The 2nd appellant has accused the Respondent of colluding with the 1st appellant to frustrate its legal rights. This is a serious allegation which I think must be considered to amount to a substantial loss on the part of the applicant. Consequently I am satisfied that any allegation made to the effect that the appellant's adversary has connived to defeat the appellant's legal rights constitute a substantial loss. It is apparent that this motion was filed without undue delay. The remaining issue which this court must take into account is security to ensure due performance of the ultimate decree or order. The court of appeal in case of **NDUHIU GITAHU & ANOTHER VS ANNAH WAMBUI WARUGONGO CIVIL APPL. NO. 3 OF 1988.**

Made the following remarks:

***“The aim is to make sure, in an even-handed manner that the appeal will not be prejudiced and that the decretal sum is available if required. The Respondent is not entitled for instance, to make life difficult for the applicant so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates.”***

The law obviously enjoins this court to consider security. The parties have not proposed any figure. I have the discretion to order the form of security in the absence of proposals. I have noted that the amount claimed in the re-amended plaint is a sum of Ksh.139, 639/=. The original figure before the amendment was a sum of Ksh.60, 548/=. To be fair I think I will direct that the 2nd appellant do deposit in this court a sum of Ksh.50, 000/=. The final orders I make is an order of stay of execution is granted on condition that: The applicant shall deposit a sum of Ksh.50, 000/= in court within 30 days from the date of this order and in default the stay order shall automatically stand discharged and the motion treated as dismissed. Costs of the application shall abide the outcome of the appeal.

**DATED AND DELIVERED THIS 18th DAY OF February 2005**

**J.K. SERGON**

**JUDGE**

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